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Attorneys for Petitioner
New Gen Engineering Group dba McIntosh and
Associates

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Adavco, Inc.,

Petitioner,

v.

Deertrail Development LLC, et al.,

Defendant.

Case No. 1:23-cv-00695-JLT-SKO

**ANSWER AND CROSS-CLAIM BY NEW
GEN ENGINEERING GROUP, INC.
AGAINST DEFENDANT MCINTOSH AND
ASSOCIATES ENGINEERING, INC.**

Demand for a Jury Trial

Judge Jennifer L. Thurston

Pursuant to Rule 8 of the Federal Rules of Civil Procedure, Defendant NEW GEN ENGINEERING GROUP, INC. (hereinafter “New Gen”) files this Original Answer to the Amended Complaint of ADAVCO, INC. (hereinafter “Adavco”), as follows:

I. Answer

1. Answering Paragraph 1: New Gen denies each and every allegation contained therein generally and specifically, and each and every part thereof, related to New Gen. As to the remaining allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient information or belief on the subject to enable it to answer any of the allegations in those paragraphs and, basing its denial on that ground, denies each and every allegation contained therein generally and specifically in each and every part thereof.

2. Answering Paragraph 2: New Gen denies each and every allegation contained therein

1 generally and specifically, and each and every part thereof, related to New Gen. As to the remaining
2 allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient
3 information or belief on the subject to enable it to answer any of the allegations in those paragraphs and,
4 basing its denial on that ground, denies each and every allegation contained therein generally and
5 specifically in each and every part thereof. Without waiver of the preceding general denial, this
6 answering defendant admits that that this court has subject matter jurisdiction over the copyright claims
7 in this action.

8 3. Answering Paragraph 3: New Gen denies each and every allegation contained therein
9 generally and specifically, and each and every part thereof, related to New Gen. As to the remaining
10 allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient
11 information or belief on the subject to enable it to answer any of the allegations in those paragraphs and,
12 basing its denial on that ground, denies each and every allegation contained therein generally and
13 specifically in each and every part thereof. Without waiver of the preceding general denial, this
14 answering defendant admits that that this court has personal jurisdiction over this answering defendant
15 and that this defendant does business in California.

16 4. Answering Paragraph 4: New Gen denies each and every allegation contained therein
17 generally and specifically, and each and every part thereof, related to New Gen. As to the remaining
18 allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient
19 information or belief on the subject to enable it to answer any of the allegations in those paragraphs and,
20 basing its denial on that ground, denies each and every allegation contained therein generally and
21 specifically in each and every part thereof. Without waiver of the preceding general denial, this
22 answering defendant admits that that venue is proper over this action and that this defendant does
23 business in Bakersfield, California within the Eastern District.

24 5. Answering Paragraph 5: New Gen denies each and every allegation contained therein
25 generally and specifically, and each and every part thereof, related to New Gen. As to the remaining
26 allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient
27 information or belief on the subject to enable it to answer any of the allegations in those paragraphs and,
28 basing its denial on that ground, denies each and every allegation contained therein generally and

specifically in each and every part thereof.

6. Answering Paragraph 6: New Gen denies each and every allegation contained therein generally and specifically, and each and every part thereof, related to New Gen. As to the remaining allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient information or belief on the subject to enable it to answer any of the allegations in those paragraphs and, basing its denial on that ground, denies each and every allegation contained therein generally and specifically in each and every part thereof.

7. Answering Paragraph 7: New Gen denies each and every allegation contained therein generally and specifically, and each and every part thereof, related to New Gen. As to the remaining allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient information or belief on the subject to enable it to answer any of the allegations in those paragraphs and, basing its denial on that ground, denies each and every allegation contained therein generally and specifically in each and every part thereof.

8. Answering Paragraph 8: New Gen denies each and every allegation contained therein generally and specifically, and each and every part thereof, related to New Gen. As to the remaining allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient information or belief on the subject to enable it to answer any of the allegations in those paragraphs and, basing its denial on that ground, denies each and every allegation contained therein generally and specifically in each and every part thereof.

9. Answering Paragraph 9: New Gen denies each and every allegation contained therein generally and specifically, and each and every part thereof, related to New Gen. As to the remaining allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient information or belief on the subject to enable it to answer any of the allegations in those paragraphs and, basing its denial on that ground, denies each and every allegation contained therein generally and specifically in each and every part thereof.

10. Answering Paragraph 10: New Gen denies each and every allegation contained therein generally and specifically, and each and every part thereof, related to New Gen. As to the remaining allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient

1 information or belief on the subject to enable it to answer any of the allegations in those paragraphs and,
2 basing its denial on that ground, denies each and every allegation contained therein generally and
3 specifically in each and every part thereof.

4 11. Answering Paragraph 11: New Gen denies each and every allegation contained therein
5 generally and specifically, and each and every part thereof, related to New Gen. As to the remaining
6 allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient
7 information or belief on the subject to enable it to answer any of the allegations in those paragraphs and,
8 basing its denial on that ground, denies each and every allegation contained therein generally and
9 specifically in each and every part thereof.

10 12. Answering Paragraph 12: New Gen denies each and every allegation contained therein
11 generally and specifically, and each and every part thereof, related to New Gen. As to the remaining
12 allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient
13 information or belief on the subject to enable it to answer any of the allegations in those paragraphs and,
14 basing its denial on that ground, denies each and every allegation contained therein generally and
15 specifically in each and every part thereof.

16 13. Answering Paragraph 13: New Gen denies each and every allegation contained therein
17 generally and specifically, and each and every part thereof, related to New Gen. As to the remaining
18 allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient
19 information or belief on the subject to enable it to answer any of the allegations in those paragraphs and,
20 basing its denial on that ground, denies each and every allegation contained therein generally and
21 specifically in each and every part thereof.

22 14. Answering Paragraph 14: New Gen denies each and every allegation contained therein
23 generally and specifically, and each and every part thereof, related to New Gen. As to the remaining
24 allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient
25 information or belief on the subject to enable it to answer any of the allegations in those paragraphs and,
26 basing its denial on that ground, denies each and every allegation contained therein generally and
27 specifically in each and every part thereof.

28 15. Answering Paragraph 15: New Gen denies each and every allegation contained therein

1 generally and specifically, and each and every part thereof, related to New Gen. As to the remaining
2 allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient
3 information or belief on the subject to enable it to answer any of the allegations in those paragraphs and,
4 basing its denial on that ground, denies each and every allegation contained therein generally and
5 specifically in each and every part thereof.

6 16. Answering Paragraph 16: New Gen denies each and every allegation contained therein
7 generally and specifically, and each and every part thereof, related to New Gen. As to the remaining
8 allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient
9 information or belief on the subject to enable it to answer any of the allegations in those paragraphs and,
10 basing its denial on that ground, denies each and every allegation contained therein generally and
11 specifically in each and every part thereof.

12 17. Answering Paragraph 17: New Gen denies each and every allegation contained therein
13 generally and specifically, and each and every part thereof, related to New Gen. As to the remaining
14 allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient
15 information or belief on the subject to enable it to answer any of the allegations in those paragraphs and,
16 basing its denial on that ground, denies each and every allegation contained therein generally and
17 specifically in each and every part thereof.

18 18. Answering Paragraph 18: New Gen denies each and every allegation contained therein
19 generally and specifically, and each and every part thereof, related to New Gen. As to the remaining
20 allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient
21 information or belief on the subject to enable it to answer any of the allegations in those paragraphs and,
22 basing its denial on that ground, denies each and every allegation contained therein generally and
23 specifically in each and every part thereof.

24 19. Answering Paragraph 19: New Gen denies each and every allegation contained therein
25 generally and specifically, and each and every part thereof, related to New Gen. As to the remaining
26 allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient
27 information or belief on the subject to enable it to answer any of the allegations in those paragraphs and,
28 basing its denial on that ground, denies each and every allegation contained therein generally and

specifically in each and every part thereof.

20. Answering Paragraph 20: New Gen denies each and every allegation contained therein generally and specifically, and each and every part thereof, related to New Gen. As to the remaining allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient information or belief on the subject to enable it to answer any of the allegations in those paragraphs and, basing its denial on that ground, denies each and every allegation contained therein generally and specifically in each and every part thereof.

21. Answering Paragraph 21: New Gen denies each and every allegation contained therein generally and specifically, and each and every part thereof, related to New Gen. As to the remaining allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient information or belief on the subject to enable it to answer any of the allegations in those paragraphs and, basing its denial on that ground, denies each and every allegation contained therein generally and specifically in each and every part thereof.

22. Answering Paragraph 22: New Gen denies each and every allegation contained therein generally and specifically, and each and every part thereof, related to New Gen. As to the remaining allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient information or belief on the subject to enable it to answer any of the allegations in those paragraphs and, basing its denial on that ground, denies each and every allegation contained therein generally and specifically in each and every part thereof.

23. Answering Paragraph 23: New Gen denies each and every allegation contained therein generally and specifically, and each and every part thereof, related to New Gen. As to the remaining allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient information or belief on the subject to enable it to answer any of the allegations in those paragraphs and, basing its denial on that ground, denies each and every allegation contained therein generally and specifically in each and every part thereof.

24. Answering Paragraph 24: New Gen denies each and every allegation contained therein generally and specifically, and each and every part thereof, related to New Gen. As to the remaining allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient

1 information or belief on the subject to enable it to answer any of the allegations in those paragraphs and,
2 basing its denial on that ground, denies each and every allegation contained therein generally and
3 specifically in each and every part thereof.

4 25. Answering Paragraph 25: New Gen denies each and every allegation contained therein
5 generally and specifically, and each and every part thereof, related to New Gen. As to the remaining
6 allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient
7 information or belief on the subject to enable it to answer any of the allegations in those paragraphs and,
8 basing its denial on that ground, denies each and every allegation contained therein generally and
9 specifically in each and every part thereof.

10 26. Answering Paragraph 26: New Gen denies each and every allegation contained therein
11 generally and specifically, and each and every part thereof, related to New Gen. As to the remaining
12 allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient
13 information or belief on the subject to enable it to answer any of the allegations in those paragraphs and,
14 basing its denial on that ground, denies each and every allegation contained therein generally and
15 specifically in each and every part thereof.

16 27. Answering Paragraph 27: New Gen denies each and every allegation contained therein
17 generally and specifically, and each and every part thereof, related to New Gen. As to the remaining
18 allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient
19 information or belief on the subject to enable it to answer any of the allegations in those paragraphs and,
20 basing its denial on that ground, denies each and every allegation contained therein generally and
21 specifically in each and every part thereof.

22 28. Answering Paragraph 28: New Gen denies each and every allegation contained therein
23 generally and specifically, and each and every part thereof, related to New Gen. As to the remaining
24 allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient
25 information or belief on the subject to enable it to answer any of the allegations in those paragraphs and,
26 basing its denial on that ground, denies each and every allegation contained therein generally and
27 specifically in each and every part thereof.

28 29. Answering Paragraph 29: New Gen denies each and every allegation contained therein

generally and specifically, and each and every part thereof, related to New Gen. As to the remaining allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient information or belief on the subject to enable it to answer any of the allegations in those paragraphs and, basing its denial on that ground, denies each and every allegation contained therein generally and specifically in each and every part thereof.

30. Answering Paragraph 30: New Gen denies each and every allegation contained therein generally and specifically, and each and every part thereof, related to New Gen. As to the remaining allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient information or belief on the subject to enable it to answer any of the allegations in those paragraphs and, basing its denial on that ground, denies each and every allegation contained therein generally and specifically in each and every part thereof.

31. Answering Paragraph 31: New Gen denies each and every allegation contained therein generally and specifically, and each and every part thereof, related to New Gen. As to the remaining allegations, including allegations as to other defendants, New Gen alleges that it does not have sufficient information or belief on the subject to enable it to answer any of the allegations in those paragraphs and, basing its denial on that ground, denies each and every allegation contained therein generally and specifically in each and every part thereof.

II. AFFIRMATIVE DEFENSES

32. FIRST AFFIRMATIVE DEFENSE (Fair Use). New Gen asserts the affirmative defense of Fair Use pursuant to Section 107 of the Copyright Act.

33. SECOND AFFIRMATIVE DEFENSE (Indemnification). New Gen asserts the affirmative defense of indemnification. New Gen alleges that any damages or liability claimed by the plaintiff were caused by the actions or omissions of a third party, for which New Gen is entitled to be indemnified by said third party. New Gen further asserts that any recovery the plaintiff should by sought from the third party responsible for the alleged damages or liability.

34. THIRD AFFIRMATIVE DEFENSE (Contribution). New Gen asserts the affirmative defense of contribution. New Gen demands that if it is found liable for any damages or liability claimed by the plaintiff, such liability should be apportioned among other responsible parties who may be jointly

1 liable. New Gen seeks contribution from these other responsible parties to share in the payment of any
2 damages or liability imposed by the court.

3 35. FOURTH AFFIRMATIVE DEFENSE (Principal-Agent Relationship). New Gen asserts
4 the affirmative defense of Principal-Agent Relationship. New Gen alleges that at all times of the incident
5 giving rise to the plaintiff's claims, New Gen, was acting as an agent on behalf of a disclosed principal,
6 Defendant Deertrail Development, LLC. New Gen further contends that all actions taken were done so
7 under the lawful instruction and authority of the controlling party in the principal-agent relationship,
8 Defendant Deertrail Development, LLC.

9 36. FIFTH AFFIRMATIVE DEFENSE (Lack of Originality). New Gen asserts the
10 affirmative defense of Lack of Originality. New Gen alleges that the allegedly infringed work lacks the
11 requisite originality for copyright protection.

12 37. SIXTH AFFIRMATIVE DEFENSE (Copyright Misuse). New Gen asserts the
13 affirmative defense of Copyright Misuse. New Gen alleges that plaintiff has engaged in copyright
14 misuse to stifle competition or exert control beyond the scope of copyright law.

15 38. SEVENTH AFFIRMATIVE DEFENSE (Innocent Infringer Defense). New Gen asserts
16 the affirmative defense of Innocent Infringement under Section 504. New Gen alleges that if
17 infringement did occur, New Gen was only not aware that its use of the work infringed the plaintiff's
18 copyright, but also that it had no reason to believe that its acts constituted infringement.

19 39. EIGHTH AFFIRMATIVE DEFENSE (Estoppel). New Gen asserts the affirmative defense
20 of Estoppel. New Gen alleges that the plaintiff is barred from asserting copyright infringement due to
21 their prior conduct or representations.

22 40. NINTH AFFIRMATIVE DEFENSE (Unclean Hands). New Gen asserts the affirmative
23 defense of Unclean Hands. New Gen alleges that the plaintiff engaged in improper conduct, such as
24 copyright infringement themselves, which disqualifies them from seeking relief.

25 41. TENTH AFFIRMATIVE DEFENSE (First Amendment). New Gen asserts the
26 affirmative defense of First Amendment protection. New Gen alleges that its actions are protected by the
27 First Amendment's guarantee of freedom of speech and right to freedom of expression.
28

1 **III. DEMAND FOR JURY TRIAL**

2 42. Pursuant to Federal Rule of Civil Procedure 38 and Civil Local Rule 201, New Gen
3 demands a jury trial on all issues present in the First Amended Complaint that are triable by a jury.

4 **IV. CROSS-CLAIM**

5 COMES NOW Answering Defendant and Cross-claimant, New Gen, by and through its counsel,
6 and hereby states and alleges a cross-complaint against Cross-defendant McIntosh & Associates
7 Engineering, Inc. (“McIntosh”) as follows:

8 43. This court has subject matter jurisdiction over the claims in this cross-claim action under
9 28 U.S.C. § 1331, 28 U.S.C. § 1338(a) through (b) and 28 U.S.C. § 1367.

10 44. This court has personal jurisdiction against McIntosh & Associates Engineering, Inc.,
11 under Cal. Code Civ. Proc. § 410.10, because McIntosh & Associates is a California corporations with its
12 principle place of business in California.

13 45. Venue in this judicial district is proper under 28 U.S.C. § 1391(b) because McIntosh
14 maintained or maintains its place of business in Bakersfield, California in this district at times relevant to
15 this cross-claim.

16 **FIRST CAUSE OF ACTION**

17 **(Contribution / Indemnification)**

18 46. McIntosh is liable to New Gen for contribution and indemnity based on joint and several
19 liability, equitable apportionment, and contractual obligation.

20 47. As part of a transaction in which New Gen acquired business assets from McIntosh, the
21 parties executed an Asset Purchase Agreement on February 1, 2022 in which McIntosh was contractually
22 obligated to indemnify New Gen.

23 48. Specifically, Section 14(d) of the Asset Purchase Agreement provides the following:

24 “14. Indemnification by Seller. Seller hereby agrees to indemnify, defend,
25 and hold harmless Buyer from and against any and all loss, liability,
26 damage, or deficiency (including interest, penalties, and reasonable
attorneys’s fees) arising out of or due to:

27 (a) Warranties and representations. A breach of any agreement,
representation or warranty made by Seller as set forth in this Agreement;

28 ...

(d) Third-party Demands. *Any and all demands made by claimants against Buyer for any and all actions, suits, proceedings, demands, assessments, judgments, costs, and legal and other attributable to events arising prior to the Closing.*” (emphasis added)

49. McIntosh and Associates performed civil engineering work for the firm’s client, Defendant Deertrail Development, LLC, which ADAVCO, Inc. has alleged involved obtaining, making copyright clearance determinations, if any, and copying of tract maps as described in ADAVCO’s First Amended Complaint beginning in April 2021 before the February 1, 2022 closing date.

50. Cross-Defendant McIntosh has or may have legal liability to Plaintiff, ADAVCO, Inc., in connection with the claims asserted in ADAVCO’s First Amended Complaint.

51. Cross-Defendant McIntosh is required to contribute to any damages awarded against Defendant New Gen, in proportion to their respective fault, or as otherwise determined by this Court given McIntosh’s duties in law, equity, and by express contract.

V. PRAYER

WHEREFORE, New Gen prays for judgment as follows:

- a. That Plaintiffs take nothing by reason of their Complaint or any claims stated therein;
- b. That Plaintiffs’ Complaint and each cause of action contained therein is are dismissed with prejudice against New Gen.
- c. A declaration that Cross-Defendant McIntosh is liable to New Gen for contribution and indemnity.
- d. For costs of suit; and
- e. For attorneys fees if appropriate; and
- f. Any such other and further relief as this Court may deem just and proper.

1 Dated:

Law Office of Brandon Martin

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Brandon Martin, Esq.

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9 Attorneys for Petitioner
10 New Gen Engineering Group dba McIntosh and
Associates
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